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FREEDOM OF SPEECH AND OF THE PRESS IN WAR TIME: THE ESPIONAGE ACT.

THE Imperial German Government had never made a secret of its willingness to encourage disloyalty among the citizens and subjects of Germany's enemies. It had officially announced: "Bribery of enemies' subjects, acceptance of offers of treachery, utilization of discontented elements in the population, support of pretenders and the like are permissible; indeed, international law is in no way opposed to the exploitation of the crimes of third parties."[1]

Before our own entrance into the war, other governments had discovered that German propaganda was a real menace and had taken action accordingly. The Governor-General of Canada, for example, under authority of the War-Measures Act of 1914, had issued dractic regulations.[2]

* The following discussion is preliminary to a more extended treatment of the subject which the author is preparing under the direction of Prof. E. S. Corwin, of Princeton University.

[1] German War Book—Morgan Translation—Page 85.

[2] It shall be an offense (a) To print, publish, or publicly express any adverse or unfavourable statement, report, or opinion concerning the causes of the present war or the motives or purposes for which Canada or the United Kingdom of Great Britain and Ireland or any of the Allied nations entered upon or prosecute the same, which may tend to arouse hostile feeling, create unrest, or unsettle or influence public opinion.

(b) To print, publish, or publicly express any adverse or unfavourable statement, report, or opinion concerning the action of Canada or the United Kingdom of Great Britain and Ireland or any of the allied nations in prosecuting the war.

(c) To print etc., any report etc., respecting the work or activities of any department, branch or officer of the public service or the service or activities of Canada's military or naval forces, which may tend to inflame public opinion and thereby hamper the Government of Canada or prejudicially affect its military or naval forces in the prosecution of the war.

(d) To print etc., any report of any secret session of the House of Commons or to refer to any secret session of the House of Commons or Senate held in pursuance

The problem that confronted the United States, when it became evident that we could not avoid war, was to meet the German attempts to arouse disloyalty among the citizens of the United States, and at the same time to keep within the limits of the authority conferred upon Congress by the Constitution.

The first legislation was clearly within the power of Congress. Early in February, 1917, both houses passed, almost without debate, the following bill:

> "Any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat, shall upon conviction be fined not exceeding $1,000.00 or imprisoned not exceeding five years, or both."[3]

I.

The Censorship Provision.

But the broader problem of thwarting German propaganda still remained, and, in February, 1917, the Attorney General recommended that legislation supplementary to the National Defense Act of March 3, 1911, be enacted. Accordingly, Mr. Overman introduced a measure into the Senate designed to give the President power to issue certain rules governing the publication of information which might be useful to an enemy of the United States.[4] Two

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of a resolution passed by the said House or Senate, except such report thereof as may be officially communicated through the director of public information.

(e) Without lawful authority to publish the contents of any confidential document belonging to, or any confidential information obtained from, any Governmental department or any person in the service of His Majesty.

(f) Any person found guilty of an offense hereunder shall upon (summary) conviction, be liable to a fine not exceeding $5,000, or to imprisonment for not more than five years, or both fine and imprisonment.

Congressional Record 65 Cong., 2nd sess., p. 6516 (May 4, 1918).

[3] C. R., 64th Congress (House Record 15314), p. 2972, Feb. 6, 1917.

[4] "Whoever, in time of war, in violation of regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movements, numbers, description, condition or disposition of any of the armed forces, ships, aeroplanes, or war materials of the U. S., or with respect to the plans or conduct, or supposed plans or conduct, of any military or naval operation, or with respect to any works or measures undertaken for or connected with or intended for the fortification or defense of any place, or any other information relating to the public defense, or calculated to be or which might be useful to the enemy, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 3 years or both by such fine and imprisonment. C. R. 64th Cong., 2nd Sess., p. 3142, Feb. 8, 1917 (S. 8148).

days later the same bill was introduced into the House by Mr. Webb. The bill passed the Senate within a week after it had been reported, by a vote of 60 to 10, with 20 not voting. The rush of business, however, prevented its consideration in the House at this session, and it did not reach a vote.

On April 2, 1917, Mr. Culberson of Texas introduced the so-called Espionage Bill into the Senate. It was stated that originally the Senate committee had tried to frame such a bill in accordance with the wishes of the Department of Justice, but that, failing to construct a satisfactory measure, they had called upon Assistant Attorney General Warren, who had prepared seventeen bills covering the subjects on which legislation was desired. After cutting these bills down to fourteen, the Committee combined them into the Espionage Bill. Of the many provisions of the bill, I shall deal first with subsection (c), Section 2, Title I, which reads as follows:

> "Whoever, in time of war, in violation of regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall collect, record, publish, or communicate or attempt to elicit any information with respect to the movements, numbers, description, condition, or disposition of any of the armed forces, ships, aeroplanes, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct, of any naval or military operations, or with respect to any works or measures undertaken for or connected with the fortification or defense of any place, or any other information relating to the public defense or calculated to be or which might be useful to the enemy, shall be punished by a fine of not more than $10,000.00 or by imprisonment for not more than ten years, or both such fine and imprisonment; provided, that nothing in this section shall be construed to limit or restrain any discussion, comment or criticism of the acts or policies of the Government, or its representatives, or the publications of the same; provided, no discussion, comment or criticism shall convey information prohibited under this section."[5]

Though in content this section was virtually the same as the measure which had received the approval of the Senate at the close of the previous session, and though it was stamped from the out-

[5] 65th Cong., 1st Session 1917, p. 766.

set with the imprimatur of the Administration,[6] its appearance was a signal for a violent outburst on the part of certain newspapers, which at once jumped to the conclusion that a censorship of the press was to be attempted. Said the MILWAUKEE NEWS, which had recently adopted the slogan of "Follow the President": "The Censorship bill . . . has aroused such a storm of disapproval that the President seeks to allay popular indignation at this glaring attempt to void Constitutional rights. . . . The whole program to muzzle the press seems to smack of unconstitutionality, tyranny, and deceit."[7] The NEW YORK TIMES, too, was greatly alarmed, and devoted a considerable part of its editorial space throughout several days to criticism of the measure and especially of its alleged unconstitutionality.[8] On the other hand, the OUTLOOK, ordinarily no friendly critic of the Administration, came to the defense of the measure, saying: "The country has a right to protect itself . . . by prohibiting the publication of any information which will do injury to the country and give aid and comfort to its enemies."[9]

The same division of opinion appeared in Congress. Here the opponents of the "Censorship Section," of whom Senator Borah was the principal spokesman, raised three constitutional objections: (1) That it proposed an unconstitutional delegation of power of legislation to the President; (2) that it denied trial by jury as re-

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[6] MY DEAR MR. WEBB:—

I have been very much surprised to find several of the public prints stating that the administration had abandoned the position which it so distinctly took, and still holds, that authority to exercise censorship over the press, to the extent that that censorship is embodied in the recent action of the House of Representatives is absolutely necessary for the protection of the Nation. I have every confidence that the great majority of the newspapers of the country will observe a patriotic reticence about everything whose publication could be of injury, but in every country there are some persons in a position to do mischief in this field who can not be relied upon, and whose interests or desires will lead to action on their part highly dangerous to the nation in the midst of a war. I want to say again that it seems to me imperative that powers of this sort should be granted.

Cordially and sincerely yours,
WOODROW WILSON.

C. R., 65th Cong., 1st Sess., p. 3343, May 31, 1917. See also Brisbane letter, C. R., 65th Cong., 1st Sess, p. 1708.

[7] *Milwaukee News,* April 30, 1917.

[8] *New York Times,* April 10, 1917. See also, April 13, 16, 19, 20, 22, 23, 24; May 3, 4, 5.

[9] *Outlook,* May 9, 1917. C. R., 65th Cong., 1st Sess., p. 2231, May 11, 1917.

[10] Revised Statutes, Sec. 5388, C-3, p. 1044. Said the Court: "But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense." *U. S.* v. *Grimaud,* 220 U. S. 521 (1911). See also *Field* v. *Clarke,* 143 U. S. 649.

quired by the Constitution; (3) that it effected an unconstitutional abridgement of the freedom of the press. Let us consider these points in turn.

(1) Would the power to issue rules within the scope of this bill have been an unconstitutional delegation of legislative power? The courts have repeatedly held that Congress has a right to delegate the power of determining some fact or state of things upon which the operation of a law may be made to depend, and on this ground a very broad delegation of power to the Secretary of Agriculture to make rules governing the use by renters of the public grazing lands was recently upheld.[10] With such adjudications as a basis, and in further consideration of the fact that the Commander-in-Chief of the military forces has a right to issue rules to safeguard his forces, we may agree with the Administration leaders in holding that the section did not attempt an unconstitutional delegation of legislative power.

(2) Did the sub-section provide a fair and impartial jury trial? The opponents of "censorship" made the point that the only question left to the jury would be the fact of publication, and not whether such news would be of any value to the enemy. They also charged that a change of venue could be had whenever the Government desired it. But had these been their real objections to the measure the amendments offered by Mr. Gard in the House[11] and by Mr. Ashurst in the Senate[12] must have removed their opposition. As it was, Mr. Ashurst's amendment was voted down in the Senate largely by the opponents of the sub-section themselves.

(3) We are brought, therefore, to the question whether the "censorship" provision would have violated constitutional freedom of the press. Amendment I of the Constitution reads as follows: "Congress shall make no law . . . abridging the freedom of the press." At the time of the Amendment's adoption there was little controversy as to the meaning of these words. Blackstone had announced the doctrine that the liberty of the press "consists

[11] The pertinent part of the Gard Amendment reads as follows: " * * * In any prosecution hereunder the jury trying the case shall determine not only whether the defendant or defendants did willfully and without proper authority publish the information (relating to the national defense) * * * but also whether such information was of such a character as to be useful to the enemy * * *" Full text see C. R., 65th Cong., 1st Sess., p. 1858, May 4, 1917.

[12] Ashurst Amendment: "Whoever, in time of war, shall furnish any information with respect to the movements, etc. * * * of the armed forces, etc. * * * shall be punished; provided that in any prosecution the jury shall determine whether such information was calculated to be useful to the enemies of the U. S." C. R., 65th Cong., 1st Sess., p. 2139, May 9, 1917.

in laying no previous restraint on publications, and not in freedom from censure for criminal matters when published." "Every freeman," he had declared, "has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. To punish (as the law does at present) any dangerous or offensive writings, which, when published, shall upon fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of the peace and good order, of government and religion, the only foundations of civil liberty."[13]

The Congressional debaters agreed generally that this was the test of the freedom of the press at the time of the adoption of the Constitution. The point on which they disagreed was whether subsection (c) really gave the President the power of establishing a *censorship* of the press. But Senator Borah contended further that such rules as the President would be authorized to make under this bill would constitute a violation of the freedom of the press, *even if, as was probable, no actual board of censors was established,* a proposition, however, for which he was able to adduce no real authority.[14]

The defenders of the sub-section, admitting that Amendment I was meant to operate in time of war as well as in time of peace, denied that it was the intention of the Administration to establish a board of censors.[15] Indeed, said Senator Overman, the rules to

[13] Cooley's Blackstone, Bk IV, pp. 151-152. See also *Rex* v. *Cuthill*, 27 St. Trials 675; *Patterson* v. *Colorado*, 205 U. S. 454; Dicey, Laws of the Constitution, 8th ed., p. 242; *Cowan* v. *Fairbrother*, 24 S. E. Rep. 212.

Mr. Gilbert E. Roe, Amicus Curiae in the case of *Peterson* v. *U. S.* (Oct., 1918), contends at length that Blackstone's definition of "freedom of the press" was not the generally accepted one at the time of the adoption of the Constitution. Mr. Roe reaches this conclusion from a consideration of (1) The address by the Continental Congress to the inhabitants of Quebec. (2) The Virginia and Kentucky Resolutions. (3) The Virginia Report 1799-1800. (4) The pardoning of all convicted under the Sedition Act of 1798. (5) The discussion of Blackstone by Tucker, quoted below in part.

The author's view is that Blackstone's definition was probably not accepted unanimously by the framers of the Constitution; but was adopted later by the Courts.

Justice Holmes, in *Schenk* v. *U. S.*, says on this point: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been its main purpose * * *" Bulletin 194.

[14] In support of this position Mr. Siegel quoted, as if it had been a judicial decision, the following words of the attorney for the defense (*Lewis Pub. Co.* v. *Morgan*): The history which precedes the First Amendment shows clearly that it was made to prevent a censorship of the press, either by anticipation through a licensing system or retrospection by obstruction or punishment." 229 U. S., 292 (1913).

He might have found better authority in Tucker (2 Tucker-Blackstone Commentaries, App. 20), where the author says: "The security of the freedom of the press requires that it shall be exempt, not only from *previous* restraint by the executive * * * but from

be laid down by the President, instead of being a previous restraint, would in reality be beneficial to the press; for they would give information as to what could be published with impunity. They would thus allow the press a greater latitude than a voluntary agreement plan possibly could; since the papers could publish, without fear of punishment, anything that was not prohibited by the rules, and also anything prohibited by them provided the publisher was willing to take the consequences.

The real question, therefore, was whether any real restraint could be laid upon publication in war time. National safety, said the supporters of the measure, makes congressional action valid, provided the action taken be taken in good faith to prevent a subversion of government.[16] Thus, even Madison had owned that it was "vain to oppose constitutional barriers to the impulse of self-preservation."[17] "The question," said Senator Fall, "as to whether or not this is necessary legislation is a question of policy. We may well . . . differ on that. To deny, however, the power of this government to do anything necessary for its preservation is to deny the work of our forefathers, and it is to deny the work of the men who saved the Union under Abraham Lincoln."[18]

Thus the way was paved for the more positive argument that the war power of Congress extends to a control over the press, if such control is necessary to carry the war to a successful conclusion, and that the President, as Commander-in-Chief of the military forces, is the best judge of such necessity.

In support of this position, the advocates of the sub-section were able to quote various judicial dicta, for instance, that "Congress

legislative restraint also; and that this exemption, to be effectual, must be an exemption not only from previous inspection of licenses, but from subsequent penalty of law."

[15] Representative Kahn, however, introduced an amendment providing for a board of censors to be composed of one member from each of the following: Department of State, Navy, Army, and four newspaper editors. C. R., 65th Cong., 1st Sess., May 4, 1917. Mr. Kahn's purpose seems to have been to make the bill so drastic as to bring about its defeat. See his speech of May 3. C. R., 65th Cong., 1st Sess., p. 1794.

Senator Thomas objected that it was only in time of war that these great constitutional limitations upon despotism are put to test. C. R., 65th Cong., 1st Sess., p. 774 See also *Ex Parte Milligan*, 4 Wall.

[16] Story says: "The language of this Amendment imports no more than that a man shall have a right to speak, write or print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace or attempt to subvert the Government." Story "Commentaries," 1851 ed., pp. 597-598.

See also *Robertson* v. *Baldwin*, 165 U. S. 275; *State* v. *McKee*, 73 Conn. 18.

[17] Madison Papers, No. 41.

[18] C. R., 65th Cong., 1st Sess., p. 844.

[19] *Ex Parte Milligan*, 4 Wall. See also Whiting, "War Powers," p. 163.

has the power to provide by law for carrying on war and that this power necessarily extends to all legislation essential to the prosecution of the war with vigor and success, except such as interfere with the command of forces and conduct of campaigns."[19] Pursuing this thought, Mr. Overman urged that "the good of society is superior to the right of the press to publish what it pleases; wherefore, if the activities of newspapers were a hindrance in the prosecution of the war, their curtailment would not be unconstitutional."[20]

The weight of the argument clearly lay with the Administration leaders. It is true that the language of the sub-section was broad enough to allow the establishment of a board of censors, and that an *involuntary* censorship would, by the burden of authority, be unconstitutional. But was it probable that the President, who has the advice of the Attorney General, would endanger his authority by pressing it to such lengths? It is more likely, to say the least, that his proclamation would only have defined the character of utterances which would, in his opinion, be useful to the enemy. Certainly no one can contend that the press has a right to publish information useful to the enemy; and if the Presidential rules declarative of this matter had been essentially reasonable the courts would undoubtedly have upheld them. In any case, had the Senate accepted the Ashurst amendment, which provided that the jury should determine whether the facts published were actually of use to the enemy, there can scarcely be a doubt that the constitutionality of the section would have been sustained.

But argument hardly determined the fate of the measure. Newspapers are politically powerful today,[21] and men whose political fortunes are dependent upon their support naturally consider their attitude toward measures before voting. At least, it is difficult to account on any other theory for the fact that other sections of the bill which restricted free speech were passed, while sub-section C was so violently denounced. Also, an examination of the history

[20] See in this connection *State* v. *McKee*, 73 Conn. 18. The principle is laid down that no one may use his property to the injury of society.

[21] The papers finally agreed to a voluntary censorship. Under this agreement, news is divided into three classes: (1) That which is palpably valuable to the enemy. This includes the movements of troops and similar topics. (2) That which is patently not valuable to the enemy. Articles descriptive of battles, of progress in naval and aviation construction fall in this class. (3) Doubtful topics. The editors submit doubtful matter to the Committee of Public Information before publication. Articles criticizing the administration are exempt from objection on that score. Attacks upon Mr. Creel, the civilian chairman, have minimized the board's influence. The censorship board was established by proclamation of President Wilson on April 14, 1917.

of the bill will show that every effort was made to eliminate the features most objected to, with the result that, in the end, the opposition were forced to admit their hostility to the sub-section in any form whatsoever. The entire discussion may well be termed a "Tempest in a Tea-pot," a "Much Ado About Nothing."

II.

Exclusion from the Mails.

The control over the press of the country, which was denied the Administration when sub-section C was voted down, was presently obtained under Title XII of the Espionage Act, which in its final form reads as follows:

> "Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing of any kind in violation of any of the provisions of this Act is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
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> "Sec. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing of any kind containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States is hereby declared to be non-mailable.
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> "Sec. 4. Whoever shall use or attempt to use the mails or the postal service of the Government for the transmission of any matter declared by this chapter to be non-mailable shall be fined not more than $5,000 or imprisoned for not more than five years, or both. Any person violating any provision of this chapter may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed."[22]

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[22] Secs. 3 and 5 were stricken out. They read as follows:

"Sec. 3. The Postmaster General may, upon evidence satisfactory to him that any person, firm, association or company is using the mails for the circulation or dissemination of any matter by this act declared to be non-mailable, forbid the use of the mails by any such person, concern, association or company.

"Sec. 5. An order of the Postmaster General forbidding the use of the mails in any case under the provisions of this chapter shall be subject to review by injunction pro-

The most notable case that has arisen under Title XII is that of the MASSES PUBLISHING COMPANY, which is worth more than passing notice in this connection.

The contest between the MASSES and the authorities began with the action of Postmaster Patten of New York in excluding the August (1917) issue of this periodical from the mails.

Immediately Mr. Rogers, representing the MASSES, called upon Solicitor General Lamar of the Postoffice Department to explain this action. According to Mr. Rogers' report, which, however, is contradicted by the Postmaster General, no definite objection to this particular issue of the MASSES was offered by the Department; but Mr. Rogers was informed that the whole tone of the publication was in violation of the Espionage Act and that its editors would be liable to prosecution unless they ceased publishing seditious matter, such as the cartoons which the excluded issue contained. An inquiry instituted by Representative Meyer London and a protest signed by Dudley Field Malone, George Creel and others is said to have received no more satisfactory reply than that given to Mr. Rogers.[23]

Recourse was now had to the courts, and on July 13 Judge Learned Hand was besought to grant a rule ordering Postmaster Patten to show cause why he should not be enjoined to release the MASSES.

Three days later Judge Hand adjourned the hearing pending investigation and possible settlement of the case out of court, and on July 17th Morris Hilquit renewed the attempt to get a definite specification of the kind of matter liable to exclusion from the mails, contending that the activities of postmasters should be limited to the filing of a claim with the Department of Justice that periodicals were violating the Espionage Act. Any other course, he said, was unauthorized by law and constituted an abuse of power

ceedings instituted in the Supreme Court of the District of Columbia." C. R., 65th Cong., 1st Sess., p. 1915, May 5, 1917. The revised law is found Stat., 65th Cong., 1st Sess., 230-231.

[23] Mr. Burleson in a letter to Congress said: "The postmasters at the place of publication of newspapers and periodicals and postmasters who submit other non-mailable matter are advised (when matter is found to come within the prohibited clauses under the law) that it was non-mailable under the act of June 15, 1917. Postmasters are being instructed to notify each publisher promptly when his publication is being held at the post office pending a ruling from the department as to its mailability. These cases are disposed of as rapidly as possible here. Postmasters submitting such publications are advised by telegraph of the action of the department and the publishers are promptly notified by them of the result." C. R., 65th Cong., 1st Sess., p. 6852, Aug. 22, 1917. The notifications to the publishers were usually expressed in the language of the Espionage Act and did not give very definite reasons for the exclusion from the mails. See Official Bulletin, Oct. 27, 1917.

aimed at the freedom of the press. This protest, however, received no more attention than had previous ones, Mr. Burleson and Mr. Herron, his assistant, taking the same ground as before.

The matter was thus thrown into court again, and on July 21 the Postmaster General submitted the definite objections to the MASSES, alleging that several articles and cartoons were in violation of the Espionage Act. Judge Hand, though admitting that the cartoons were "designed to arouse animosity to the draft and the war," granted an injunction, saying that the articles "did not counsel resistance to law and therefore did not violate the Espionage Act."[24] He also urged the point that there was no distinction between non-mailable and indictable matter under the Act.

Counsel for the Department, however, promptly secured from Judge Hough a temporary stay of injunction on the ground of error, though, pending the convening of the Circuit Courts of Appeals with power to dispose of the injunction issue, Mr. Patten was required to give bond to cover a possible damage suit if the case should be decided against him.

Before the Court of Appeals met, Mr. Burleson, in a letter to the Senate, charged the MASSES with being "a leader in propaganda to discourage enlistments, prevent subscriptions to Liberty Loans, and obstruct the draft."[25]

The editors of the MASSES, however, were not to be warned from their course. The September issue was written in the same strain as the earlier one, and it too was excluded from the mails; and this time the exclusion was upheld by Judge A. N. Hand, who sustained the Postmaster General on the ground that the MASSES was not a "magazine or other publication regularly issued" within the meaning of the postal laws, inasmuch as certain issues had been justly excluded from the mails for a violation of the Espionage Act.[26] This decision, therefore, asserted the justice of both exclusions.

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[24] Quoted in *Masses Pub. Co.* v. *Patten,* Bulletin 7, p. 15. See also *N. Y. Times,* July 22, 1917.

[25] C. R., 65th Cong., 1st Sess., p. 6852, Aug. 22, 1917.

[26] In a letter to the Senate, Aug. 22, 1917, Mr. Burleson said: "In order for any publication to have the second-class privilege, it must, among other things, be issued regularly at stated intervals, and in order to be permitted to the mails under any classification it must be mailable under the law.

All the publications, including the Masses, which have had the second-hand privilege withdrawn on account of violations of the Espionage Act, have lost that classification primarily for the reason that they were publishing matter which made their issues non-mailable under any classification, and hence are not "newspapers and other periodical publications" within the meaning of the law governing second-class matter.

"For many years this department has held publications not to be 'regularly issued'

At this point it may be well to note some of the objectionable utterances of the MASSES. The June issue contained the following passage:

> "We wish to persuade those who love liberty and democracy enough to give their lives for it to withhold the gift from this war and save it to use in the sad renewal of the real struggle for liberty that will come after it,"—a very direct appeal against enlistment.

Again, the July issue said:

> "We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world."

Similarly, the August issue was filled with glorification of those who refused to enlist and violated the law, and the September issue contained like matter in diluted form.[27]

On November 2, 1917, the Circuit Court of Appeals sustained Judge Hough's stay of injunction. Thereupon the news-stands be-

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in contemplation of law when any issue contained non-mailable matter; and when the second-class privilege has been withdrawn under such circumstances, the formal notice of withdrawal has contained the statement that the second-class privilege has been revoked on the grounds stated * * *

"In the case of the Masses the final action was necessarily based on other and much broader grounds than a break in the continuity of publication." C. R., 65th Cong., 1st Sess., p. 6852, Aug. 22, 1917.

[27] Bulletin 26, pp. 3-4. The case of the *Jeffersonian* was similar to that of the *Masses*. In the issue of June, 1917, we find: "Men conscripted to go to Europe are virtually condemned to death and everybody knows it." A more direct appeal to obstruct recruiting appeared in July: "I advise the conscripts to await the decision of the United States Supreme Court and not to be clubbed by the fact of conscription into enlistment." Judge Speer, taking the same ground that Judge Hough had taken in the Masses case, declared that the Postmaster General was right in excluding the Jeffersonian from the mails. Bulletin 24.

But the Espionage Act applies not only to comments on American affairs but to those in regard to our allies. For example the *Gaelic American* was excluded from the mails for printing the following in regard to the British Attorney General, Sir Frederick Smith: "Smith is in this country as the agent of the English Government, for the purpose of perfecting cooperation between the United States and England in the war. Yet he has no hesitation in making a bitter and brutal attack on the Irish People * * * The clear-headed, keen-witted Yankees who read his bitter attack on the Irish will not wonder at the Irish for refusing to fight for a government of which Smith is a member."

The Irish World was equally bitter against our allies and was excluded from the mails for saying: "In spite of political changes in any direction, the trend of French life and ideals for a century has been toward materialism. After every war and every misfortune their Government, political science, civic ideals, and other artistic productions have gone lower in the scale from the Catholic ideal."

Again of Palestine, it said: "Nothing of the sort [the establishment of a Jewish Kingdom] is either promised or probable. Unless the Peace Congress should oblige them to give up Palestine, the country will be put on the same footing as Egypt. It will continue under alien rule."

gan refusing to receive copies of the MASSES, fearing prosecution under the Trading with the Enemy Act, which had just been enacted. Presently the MASSES staff were indicted on the two-fold charge of attempting to send non-mailable matter through the mails, and of conspiracy to violate the Espionage Act, but the two trials which followed both resulted in hung juries.

The MASSES had meantime ceased to exist, but the same editorial staff now publishes the LIBERATOR, which has thus far avoided trouble with the postal authorities.

The MASSES *Case* squarely raised three Constitutional issues: (1) Is circulation in the mails a part of the freedom of the press? (2) Have the courts the power to review the Postmaster General's decisions as to non-mailability, or is the decision of the Postmaster General final? (3) Does the exclusion from the mails deprive a publisher of property without due process of law? Let us consider these points in turn.

(1) The contention that the denial of postal facilities is tantamount to a denial of the right of publication was first voiced by Calhoun many years ago. But the Court has subsequently been at pains to point out that the argument was not well founded.

In *Ex parte Jackson*, 96 U. S. 733, the Supreme Court, in denying that a law excluding lottery tickets from the mails abridged the freedom of the press, said: "In excluding various articles from the mails the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals." Also, in upholding the act of 1890 by which "any newspaper, circular, pamphlet or publication of any kind containing any advertisement of any lottery" was excluded from the mails, the Court remarked: "The circulation of newspapers is not prohibited, but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matter condemned by its judgment through the governmental agencies which it controls."[28]

Finally in *Public Clearing House* v. *Coyne*, 194 U. S. 497 (1904) the Court said: "In establishing such [postal] system Congress may restrict its use to letters and deny it to periodicals; it may admit

[28] *In re Rapier*, 143 U. S. 110 (1892). For the law, see 26 Stat. L., 463.

books to the mails and refuse to admit merchandise, or it may include all these and fail to embrace within its regulations telegrams or large parcels of merchandise."

In short, the use of the mails, is, to an extent at least, a revocable privilege, and may be subjected to reasonable conditions.[29] We may therefore agree with Judge Rogers in saying: "The Espionage Act imposes no restraint prior to publications, and no restraint afterwards except as it restricts circulation through the mails. Liberty of circulating may be essential to the freedom of the press, but liberty of circulating through the mails is not, so long as its transportation in any other way as merchandise is not forbidden.. . . The Espionage Act, in so far as it excludes [from the mails] certain matter declared to be non-mailable, is constitutional." (246 Fed. 29.)

(2) Likewise, there can be no doubt that the decisions of the Postmaster General regarding the mailability of matter controlled by the Act are final. Some of the precedents governing this phase of the question are the following:

In *United States ex rel. Dunlap* v. *Black,* 128 U. S. 140 [1888], the Court held that a mandamus to the Commissioner of Pensions was properly refused, saying: "The Court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even when those duties require an interpretation of the law, the court having no appellate power for that purpose." Again in *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, it was held that neither an injunction nor a mandamus would lie against an officer of the Land Department to control him in discharging an official duty which required the exercise of his judgment and discretion. Mr. Justice Peckham, speaking for the Court, said: "Whether he [the Secretary of the Interior] decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction."

Still more to the point, if possible, is the language of Justice Brown in *Bates & Guild Co.* v. *Payne,* 194 U. S. 106 (1904). "Where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his

[29] In 1907, for example, Attorney General Bonaparte advised Mr. Roosevelt "that it is clearly and fully within the power of Congress to exclude from the mails publications such as La Questione Sociale and to make the use or attempted use of the mails for the transmission of such writing a crime against the United States. Rogers, Postal Powers of Congress, p. 119.

action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of the opinion that his action was clearly wrong."[30]

From these cases Judge Rogers concluded: "This court holds, therefore, that if the Postmaster General has been authorized and directed by Congress not to transmit certain matter by mail and is to determine whether a particular publication is non-mailable under the law, he is required to use judgment and discretion in so determining, and his decision must be regarded as conclusive by the courts, unless it appears that it was clearly wrong.[31]

The entire question, then, resolved itself into a determination whether the Postmaster General acted within his jurisdiction under the authority conferred upon him by Congress. His constitutional right to use discretion within that jurisdiction is clearly established.

(3) Lastly, did the denial of postal facilities deprive the owners of the MASSES of property without due process of law? The argument that it did seems to rest on the assumption that due process of law always signifies judicial process, which is far from the case. In the words of Judge Cooley (*Weimer* v. *Brubury*, 30 Mich. 201), "there is nothing in these words ['due process of law'] which necessarily implies that due process of law must be judicial process."[32] Indeed the statute which confers powers upon the Postmaster General to prevent the mails from being used as an instrument of fraud seems to stand on all fours with the present law, and it received the sanction of the Court in the following words: "It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action

[30] See also *Decatur* v. *Paulding*, 14 Peters 497; *Public Clearing House* v. *Coyne*, 194 U. S.; *Smith* v. *Hitchcock*, 226 U. S.; *Lewis Pub. Co.* v. *Morgan*, 229 U. S.

[31] *Masses Publishing Company* v. *Patten*, Bulletin 7, p. 10 and 246 Fed. 33. As Judge Hough said: "It is at least arguable whether any constitutional government can be judicially compelled to assist in the dissemination of something that proclaims itself revolutionary,—which exists not to reform but to destroy the rule of any party, clique or faction that could give even lip service to the Constitution of the United States." *New York Times*, Aug. 2, 1917.

In the Masses case and the Jeffersonian case his action was upheld. To show the Postmaster General is wrong, Judge Speer (*Jeffersonian Pub. Co.* v. *West*, B. 24) said the petitioner "must come before the court with clean hands."

[32] See also *Murray* v. *Hoboken Land and Imp. Co.*, 18 Hon. 272 and *Bushnell* v. *Leland*, 164 U. S.

of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness."[33]

Two Constitutional objections were raised in Congress to Title XII which did not come before the courts: (1) That Title XII denied the right of the people to be secure in their papers against unreasonable searches and seizures; (2) that a practical censorship would be created, since publishers would have to consult the Postmaster General before publishing any questionable matter. The former objection was removed by amendment,[34] and the latter clearly fails to distinguish between a censorship imposed upon the press by law and "a voluntary censorship" so-called, instituted for the convenience of publishers to guide them in their interpretation of their legal duties and to warn them from possibly dangerous courses.

III.

Exclusion from Interstate Commerce.

Title XII may be said to have been completed by Section 19 of the Trading with the Enemy Act of October 6, 1917, which reads in part as follows:

> "That ten days after the approval of this Act, and until the end of the war, it shall be unlawful for any person, firm, corporation, or association, to print, publish, or circulate or

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[33] *Public Clearing House* v. *Coyne*, 194 U. S. 497 (1904). See also *Bates and Guild Co.* v. *Payne*, 194 U. S. 106; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S.

Further in answering the objection that due process of law was denied when an executive official was given authority to control the disposition of property the Court in the Coyne case said: "Nor do we think the law unconstitutional because the Postmaster General may seize and detain all letters, which may include letters of a purely personal or domestic character and having no connection whatever with the prohibited enterprise." In view of the fact that by these sections the postmaster is denied permission to open any letters not addressed to himself, there would seem to be no possible method of enforcing the law except by authorizing him to seize and detain all such letters. It is true it may occasionally happen that he would detain a letter having no relation to the prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day, containing remittances or correspondence connected with the prohibited business, it is not too much to assume that prima facie at least, all such letters are identified with such business. A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to a practical annulment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts." *Public Clearing House* v. *Coyne*, 194 U. S. 497 (1904). See also *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

[34] The amendment read as follows: "Nothing in this section shall be so construed as to authorize any person other than an employee of the dead-letter office duly author-

cause to be printed, published or circulated in any foreign language, any news item, editorial or other printed matter, respecting the Government of the United States, or of any nation engaged in the present war, its policies, international relations, the state or conduct of the war, or any matter relating thereto: Provided, that this section shall not apply to any print, newspaper or publication, where the publisher, or distributor thereof, on or before offering the same for mailing or in any manner distributing it to the public, has filed with the postmaster at the place of publication, in the form of an affidavit, a true and complete translation of the entire article containing such matter proposed to be printed, in plain type in the English language, at the head of such print, newspaper, or publication, the words 'True translation filed with the postmaster at ..... on ..... as required by the Act of .....'

"Any print, newspaper or publication in any foreign language which does not conform to this section is hereby declared to be non-mailable, and *it shall be unlawful for any person, firm, corporation, or association to transport, carry or otherwise publish or distribute any matter which is made non-mailable by the provisions of the act relating to espionage, approved June* 15, 1917: Provided further, that upon evidence satisfactory to him that any print, newspaper or publication printed in a foreign language may be printed, published and distributed free from the foregoing restrictions and conditions without detriment to the United States in the present war, the President may cause to be issued to the printers or publishers of such print, newspaper or publication, a permit to print, publish and circulate the issue or issues of their newspaper or publication free from such restrictions and requirements, such permits to be subject to revocation at his discretion. And the Postmaster General shall cause copies of all such permits to be furnished to the postmaster of the postoffice serving the place from which the print, newspaper or publication granted the permit is to emanate.

"Any person who shall make an affidavit containing any

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ized thereto, to open any letter not addressed to himself." C. R, 65th Cong., 1st Sess., p. 2162.

For similar language see 25 Stat. L., 873.

The seizure of letters in any other way is unlawful: 35 Stat. L., 1125.

The amendment was added to prevent abuse of power by the Postmaster General, C. R., May 4, 1917.

> false statement in connection with the translation provided for in this section shall be guilty of the crime of perjury and subject to the punishment provided therefor by section one hundred and twenty-five of the act of March 4th, 1909. entitled 'an Act to codify, revise, and amend the penal laws of the United States,' and any person, firm, corporation or association violating any other requirement of this section shall, on conviction thereof, be punished by a fine of not more than $500, or by imprisonment for not more than one year, or in the discretion of the court, may be both fined and imprisoned."[35]

The Constitutional question raised by these provisions is clear from our consideration of the MASSES *Case*. In that case the court in sustaining Title XII had been at pains to point out that "the act of Congress now called in question does not undertake to say that certain matters shall not be *transmitted in interstate commerce.*" But this is just what the Trading with the Enemy Act does undertake to say; the question is, therefore, whether Congress has the right to deny published matter the facilities of interstate commerce.

The theory of the Court in the *Jackson Case* cited above is clearly adverse to any such claim of authority. In that case the Court said: "Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value; if, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."

And in the *Rapier Case* the language used is of like import even though less outspoken.[36] Furthermore, even in *Champion* v. *Ames*, while sustaining the right of Congress to exclude lottery tickets from interstate commerce, the Court did so on the theory that such tickets were "articles of commerce," and it avoided the question also raised in that case of Congress's right to exclude lottery *advertisements* from interstate commerce.[37]

Altogether, therefore, I think it has to be admitted that the Supreme Court's position on the question of the exclusion of published matter from the channels of interstate commerce is still somewhat doubtful. Nevertheless, the position that the Court must finally take is clear enough. Surely there can be no right of circulation in interstate commerce for matter which may be directly

[35] Trading with the Enemy Act, Stat., 65th Cong., 1st Sess., 425-426. Italics are mine.
[36] 143 U. S., 110 (1892).
[37] 188 U. S. 321 (1902).

banned by law. Conceding that Congress had the right to penalize the kind of publications which it does penalize by the Espionage Act, it had the collateral right to exclude such publications not only from the mails but also from interstate commerce. There can be no right of circulation for that which there is no right to utter.[38]

There is little question of the constitutionality of that section of the Trading with the Enemy Act which requires a translation of articles written in a foreign language. The primary purpose of the section was to make the Espionage Act more easily enforceable. The Court, following its usual custom of making large allowances for the requirements of administration,[39] would probably uphold the section. Moreover, it could scarcely be said that any restraint is put upon the freedom of the press, since the provision, taken by itself, in no wise restricts the expression of opinion, but merely imposes conditions, compliance with which is necessary before papers are allowed to circulate in interstate commerce.[40]

Title XII has received its most recent extension from the Act of May 16, 1918, which, however, is principally important for its additions to Title I, Section 3 of the Act, which is considered below. The provisions of the later act affecting Title XII are the following:

> "That Section 1 of Title XII and all other provisions of the Act entitled 'An Act to prevent interference with the foreign commerce, etc., of the United States' which apply to Section 3 of Title I thereof shall apply with equal force and effect to said Section 3 as amended.
>
> "Section 3. That Title XII of the said Act of June 15, 1917, be, and the same is, hereby amended by adding thereto the following Section—(4):
>
> "The Postmaster General may, upon evidence satisfactory to him that any person or concern is using the mails in violation of any of the provisions of this Act, instruct the Postmaster at any postoffice at which the mail is received addressed to such person or concern to return to the postmaster at the office at which they were originally mailed all letters or other matter so addressed, with the words 'Mail

[38] For intimation that Congress may regulate interstate commerce, even though its laws are in the nature of police regulations see *Hoke and Economides* v. *U. S.*, 227 U. S.; *Hammer* v. *Dagenhart*, 247 U. S.

[39] See *Crane* v. *Campbell*, 245 U. S.; *Otis* v. *Parker*, 187 U. S.; *Miller* v. *Oregon*, 208 U. S.; *Silz* v. *Hesterberg*, 211 U. S.; *McDermott* v. *Wis.*, 228 U. S.

[40] In *Lewis Pub. Co.* v. *Morgan* (229 U. S.) the Court upheld the Newspaper Publicity Law (37 Stat. L. 553), which imposed restrictions upon the press.

> to this address undeliverable under the Espionage Act' plainly written or stamped upon the outside thereof, and all such letters or other matter so returned to such postmasters shall be by them returned to the senders thereof under such regulations as the Postmaster General may describe."[41]

The chief question here raised is as to the scope and intention of the new provision. Is it preventive and protective merely, or is it punitive? If the intention of Congress is to penalize the violation of the Espionage Act by this measure, Section 4 is clearly unconstitutional as amounting to a denial of trial by jury. But the adoption of such a provision to prevent further violations of the law and to aid in its enforcement presents merely the question just considered in connection with the requirements of the Trading with the Enemy Act, that certain matter published in a foreign language be accompanied by a translation in English. It may be added that the Fraud Order Act of 1913, the validity of which is, as we have seen, fully established, employs language which is almost identical with that of the section under consideration.

From this discussion it is clear that the use of the mails is, to some extent, a revocable privilege, subject to regulation by Congress. By authorization of Congress, the Postmaster General may exercise large discretion in determining what shall be transmitted through the mails: provided always that he acts within the jurisdiction conferred upon him. Congressional authority is also validly exercised in excluding certain matter from interstate commerce. Exclusion of matter from the mails and from interstate commerce alike is clearly within the power of Congress, if such action is necessary to make effective legitimate restrictions upon the freedom of publication.

IV.

Disloyal Utterances.

So far we have dealt with those provisions of the Espionage Act which are intended primarily to govern the circulation of matter, and we have stated the general conclusion that the right of circulation is collateral to the right of publication, and that, accordingly, there can be no right of circulation where there is no right of publication or utterance. We now turn to Section 3 of Title I of the same Act, which is designed directly to curb certain kinds of utterances. It reads as follows:

[41] Public No. 150, 65th Cong. (H. R. 8753).

> "Whoever, when the United States is at war, shall willfully make or convey false statements with intent to interfere with the operations or success of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than 20 years or both."[42]

Though these provisions, as I have indicated, touch immediately the matter of freedom of utterance under the Constitution, they called forth, curiously enough, very little discussion on the floors of Congress. They have, on the other hand, come under judicial scrutiny in a great number of cases, to which, therefore, we may turn for further light upon the constitutional question. For not only have the courts uniformly upheld this section, but they have construed its terms liberally from the point of view of authority rather than otherwise; and they have done this, it must be presumed, with the elementary rule in mind, that it is the duty of the courts to construe statutes, if possible, so as to keep them within Constitutional limitations. Our review of the cases may well begin with some general considerations underlying them all.[43]

The defendant in a criminal action, we are more than once reminded in these cases, is presumed to be innocent until his guilt is proved beyond a reasonable doubt, and the fact that an indictment has been brought against him is no evidence of his guilt.[44] To the benefit of this presumption each defendant is entitled unless, or until, it have been removed by evidence proving his guilt beyond a reasonable doubt. The burden is, therefore, on the Government of establishing every essential element of the crime charged beyond a reasonable doubt, which "is a doubt growing reasonably out of the evidence or lack of it." It is, in other words, "not a captious doubt;

[42] Stat., 65th Cong., 1st Sess., 218.

[43] The review of these cases is based upon the Department of Justice Bulletins (hereafter referred to as "B"). It has been charged that the Department of Justice has attempted to influence judicial decisions by suppressing those which were contrary to the Attorney General's interpretation of the law. A few such cases are cited in Nelles, *Espionage Act Cases*, but the evidence does not seem conclusive.

[44] *U. S.* v. *Harper*, B. 76, p. 7; *U. S.* v. *Gneiser et al.*, B. 71, p. 2; *U. S.* v. *Wolf*, B. 81, p. 3; *U. S.* v. *H. G. Mackley*, B. 83, p. 1; *U. S.* v. *Schenk et al.*, B. 43; *U. S.* v. *Pierce*, B. 52; *U. S.* v. *Baltzer*, B. 3.

not a doubt engendered merely by sympathy for the unfortunate position of the defendant or the dislike to accept the responsibility of convicting a fellow man." If accordingly, having weighed the evidence on both sides, one reaches the conclusion that a defendant is guilty to that degree of certainty that would lead one on to act on the faith of it in the most important and critical affairs of one's life, one may properly vote for conviction. Proof beyond a reasonable doubt is not proof to a mathematical demonstration. It is not proof beyond the possibility of a mistake. If such were the standard of evidence required, most criminals would go unwhipped of justice.[45]

The jury, in considering the evidence, is, of course, to maintain an impartial and unbiased judgment.[46] Judge Day charged the jury: "To no extent are you to be influenced by any bias on the one hand or prejudice on the other hand that may arise from extraneous considerations or from your sympathies for or against the defendant personally or for or against the United States in its efforts to enforce the criminal laws."[47] Such instructions were generally given in the Espionage cases.

A material element of the crimes punished by Section 3 is the *intent* with which the acts there enumerated are performed. What is intent? "Intent," says the court in one of these cases, "in doing an act, speaking words, or writing them, . . . is made up, among other things, of what a person thinks and desires and wishes to accomplish or to bring about by means of the doing of the act, or the speaking of the words, or the writing" (of them).[48] In short, intent means "the conscious expectation of the effect to be produced."[49]

But naturally, it is impossible to enter into the mind of man and determine by any sort of scientific demonstration what he expects to accomplish. So at this point the law steps in and says that a man

[45] *U. S.* v. *Yeutzey*, 91 Fed. 868.

[46] Some of the criticism directed against the enforcement of the act is due to the fact that the jurors' minds have been inflamed by appeals to patriotism and by constant reminders from the U. S. attorneys that the Act must be strictly enforced.

See in this connection Annual Report of the Attorney General (1918), p. 673—No. 824.

[47] *U. S.* v. *Gneiser*, B. 71, p. 1.

See also *U. S.* v. *Baltzer et al.*, B. 3, p. 10; *U. S.* v. *Max Eastman*, "Espionage Act Cases", p. 29.

It may be remarked that Mr. Nelles' book, "Espionage Act Cases", was produced with the evident purpose of influencing opinion in favor of a milder interpretation of the law. With this purpose in view, only certain sections of the cases reported in the Bulletins are given, and cases not elsewhere reported are treated at length.

[48] *U. S.* v. *Clinton H. Pierce*, B. 52, p. 18.

[49] See *U. S.* v. *Floyd Ramp*, B. 66; *U. S.* v. *Huhn*, B. 58.

is presumed to intend the reasonable and natural consequences of his acts, and that a man can not say or do a thing that will have certain consequences and then say he did not intend them. As various judges have put it: If the natural consequences of a defendant's language is calculated to produce the effect of causing disloyalty —then there may be indulged a presumption that that was his intention. But that is not a conclusive presumption.[50] This presumption is one of fact, in the absence of evidence to the contrary, and it may be said to apply to one's words as well as to one's acts.[51]

Questions of fact under the Espionage Act are, of course, determined by the jury. It is evident, therefore, that the jury must decide whether the natural, reasonable and probable effect of a statement would be the unlawful things forbidden by the act, which in turn is a question to be resolved in light of all the circumstances of the case.[52] In this connection the words of Judge Amidon in his charge to the jury in the *Brinton Case,* are pertinent:

> "You can tell what was in Mr. Brinton's mind . . . by weighing his speech, his language, the occasion upon which it was spoken, and then say, under your oaths, as an inference from it, whether he was actuated by that purpose or not."[53]

The point may also be illustrated concretely. Thus Mrs. Stokes was convicted for saying in public print: "No government which is for profiteers can also be for the people, and I am for the people, while the government is for the profiteers."[54] On the other hand, Judge Hook in granting a new trial to one Charles Doll said:

> "The crimes were charged to have been committed June 20, 1917, by the use of language which was too profane and obscene to be set forth in this opinion. It was quite clearly shown at the trial that the accused was under the influence of liquor and had or thought he had a grievance against the government over a right to timber from a forest

[50] See *U. S.* v. *William Denson,* B. 142; *U. S.* v. *Windmuller,* B. 112; *U. S.* v. *Stevens,* B. 116; *U. S.* v. *Goldsmith,* B. 133; *U. S.* v. *Wallace,* B. 4; *U. S.* v. *O'Hare,* B. 49; *U. S.* v. *Williams,* B. 118; *U. S.* v. *Pierce,* B. 52; *U. S.* v. *Waldron,* B. 79; *U. S.* v. *Mackley,* B. 83.

[51] See *U. S.* v. *Fontana,* B. 148; *U. S.* v. *Prieth,* B. 156; *U. S.* v. *Shoeber,* B, 149, p, 3.

[52] *U. S.* v. *Weinberg,* B. 123; *U. S.* v. *Bussel,* B. 131.

[53] *U. S.* v. *Briton,* B. 132, p. 8. See also: *U. S.* v. *Spillner,* B. 145; *U. S.* v. *Martin,* B, 157; *U. S.* v. *Henrickson,* B. 86; *U. S.* v. *Frerichs,* B. 85; *U. S.* v. *Pundt,* B. 82; *U. S.* v. *Foster,* B. 87; *U. S.* v. *Sugarman,* B. 12.

[54] *U. S.* v. *Stokes,* B. 106, p. 2.

> reservation. The language was used in a conversation with two forest officers to whom he made his complaints. It appeared that at the time the officers were also engaged in recruiting for the Engineer Military service, but the fact was not told the accused nor did he know it. . . . We think there was nothing in this case fairly indicating that the accused intended the results which are the essential elements of the offenses or that such results in fact followed or would naturally follow what he said."[55]

It will be seen that the expressions of Doll were much stronger than those of Mrs. Stokes, but the circumstances proved that the intent of the latter was penal, while that of the former was not.

We may now turn more particularly to the section under discussion. It is needless to say that after April 6, 1917, the United States was at war with Germany. We may, then, confine our attention to the criminal acts covered by the section and to a definition of its terms.

It is clear that three classes of acts constitute crimes under these provisions. The first consists in the willful making or conveying false reports or statements with the intent specified. The second is the willful causing or attempting to cause insubordination, mutiny, or refusal of duty in the military or naval forces of the United States. The third consists in willfully obstructing the recruiting or enlistment service of the United States. Let us consider these crimes seriatim.

The first crime is willfully making or conveying false statements, etc., with the intent to interfere with the operation or success of the military or naval forces of the United States. The falsity of the statement being shown, the intent is the essential element of the crime. As I have shown, the intent is determined from the character of the utterance and the circumstances under which it was made.[56] "Willfully" is defined to mean willingly, purposely, intentionally, as contradistinguished from accidentally or inadvertently; it emphasizes the notion of *intent*.[57]

Since the making of false reports or statements with the specified intent is made illegal, it is important to know what the courts class as *false statements*. It is generally conceded that

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[55] *U. S.* v. *Charles Doll*, B. 163, pp. 1-2.

[56] Supra, note 52.

[57] *U. S.* v. *Waldron*, B. 79, p. 5; *U. S.* v. *Pierce*, B. 52, p. 17.

> "A false report or statement, as used here, means a statement as to some past or existing fact. It would not include a mere opinion, a prophecy or a wish, or a hope, because those are not statements of fact."[58]

But the line between these two categories is not always clear. Judge Munger thought Claude Bunyard could not be held guilty under this clause for saying: "This is a rich man's war, and a poor man's battle"; but some other judges would probably have taken a more rigorous view.[59] The same difficulty is further illustrated by the cases which concerned statements about the motive of our entrance into the war. Opinions might vary about that. Nevertheless, some judges have ruled that there is a definite criterion of truth in the matter. Thus Judge Jack in a charge to the jury states:

> "You will note that Congress assigned for its reason for the adoption of the resolution (of war) that the Imperial German Government had committed repeated acts of war against the Government and people of the United States of America. Congress but recited historical facts well known to all who read the newspapers and keep up with current events.
>
> "It is not for you to question the correction of this finding and declaration of Congress, but you should accept it as correctly stating the cause for the entrance of the United States into the war."[60]

It is perhaps safe to state that one can not affirm without considerable risk that we went into the war from unworthy motives.

One other question which arises in connection with the crime of making false statements is, Who compose the "military and naval forces of the United States"? In this particular connection, the phrase has been very broadly construed, much more broadly than in connection with the two ensuing clauses of the section. Thus Judge Wooley says:

> "The controlling word of the statute is interference, and if the intent with which the false statements are made is to work such interference, it matters little whether that end is

[58] *U. S.* v. *Frerichs,* B. 85, p. 6. See also: *U. S.* v. *Hall,* 248 Fed. 156; *Masses Pub. Co.* v. *Patten,* Nelles, *Espionage Cases,* p. 21; *U. S.* v. *Zimmerman,* Nelles, p. 10.

[59] *U. S.* v. *Bunyard,* B. 168, p. 2.

[60] *U. S.* v. *Harper,* B. 76, p. 3. The same is implied in *U. S.* v. *Pierce,* B. 52; *U. S.* v. *Stokes,* B. 106.

[61] *U. S.* v. *Stevens,* B. 116, p. 7. See also *U. S.* v. *Koenig,* B. 123.

> reached directly or indirectly. In other words, so far as the first crime is concerned, to interfere with the success of the country by destroying, or weakening, or undermining any recognized and properly adapted instrumentality or organization which effectively aids in and contributes to that success is to interfere with the success of the military forces within the meaning of this statute."[61]

Substantially the same opinion is expressed or implied in nearly every judicial utterance dealing with the crime of making false statements with the specified intent.

To conclude, therefore—The first offense punished by Section 3 of Title I of the Espionage Act consists in purposely making false statements of fact with the design, as shown by the circumstances, of interfering directly or indirectly with any organized and recognized agency of the Government that is engaged in pushing the war to a successful conclusion.

The second offense, in the language of the statute, consists in 'willfully causing or attempting to cause insubordination, mutiny or refusal of duty, in the military or naval forces of the United States.' It will not be necessary to repeat the definitions I have given, except that of "the military and naval forces of the United States."

One view has it that the military and naval forces include those who have been examined, accepted and enrolled as soldiers.[62] This is the narrowest meaning that has been given the term and but few judges have so interpreted the statute.

The preponderant opinion is that the "military forces" as the term is used in this part of the section, include those who have registered and who have received their serial numbers. Judge Westenhaver, in defining the term, says:

> "For the purpose of this act and this offense, I say to you that all such persons thus registered and enrolled and thus subject from time to time to be called into active service are a part of the military forces of the United States."[63]

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[62] *U. S.* v. *Britton*, B. 132; *U. S.* v. *Mayer*, B. 156; *U. S.* v *Frerichs*, B. 85; *U. S.* v. *Fontana*, B. 148; *U. S.* v. *Hall*, 248 Fed. 150.

[63] *U. S.* v. *Debs*, B. 155, p. 6. See also: 30 Stat., 361; *U. S.* v. *Sugarman*, B. 12; *U. S.* v. *Reeder*, B. 161; *U. S.* v. *Harper*, B. 76; *U. S.* v. *Waldron*, B. 79; *U, S.* v. *Rhuberg*, B. 94; *U. S.* v. *Miller*, B. 104; *U. S.* v. *Stokes*, B. 106; *U. S.* v. *Sandvick*, B. 113; *U. S.* v. *Graham*, B. 120. In *U. S.* v. *Fontana*, B. 148, the court intimates that the registrants must have been accepted before they can be said to be in the military forces. In the majority of cases, however an attempt to arouse physical resistance to the draft would be within this clause.

Under other judges a yet wider application has been given the term. Judge Hamilton declares: "The military forces of the United States means all the able bodied men of the United States,"[64] a view which still other judges have curtailed somewhat by confining it to men between the ages of eighteen and forty-five.[65]

But by what methods, in what way, may one cause or *attempt* to cause insubordination, etc.? Not merely by acts, in the conventional sense of the term, but by words as well, written or spoken, answer the courts.[66] Nor is the truth or falsity of a statement material to the offenses recognized by this and the ensuing clause of the section; their tendency and intent are their important ingredients.

> "If," says Judge Amidon of certain defendants, "they disseminated printed matter which, though it might be historically true, still, as a natural result, would tend to accomplish things forbidden by law, and the act was done with willful intent to accomplish those results, it would be a crime."[67]

In brief, then, any utterance tending to incite insubordination, etc., on the part of men registered and enrolled in the service of the United States, would offend against the second clause of Section 3, unless the circumstances surrounding the utterance clearly established the lack of criminal intent.

The third crime covered by Section 3 is the willful obstruction of the recruiting or enlistment service of the United States, to the injury of the service of the United States. Any obstruction of the recruiting would be to the injury of the service, so we may omit consideration of that point. We have to consider, then, the meaning of the phrase, "obstruction" of the "recruiting and enlistment service."

The word "obstruct" is defined to mean to hinder, to embarrass, to make progress more difficult or slow, and in its broadest use means active opposition to the recruiting and enlistment service of the United States by advising or counseling others not to enlist.[68] In other words, no act of violence is required to complete the offense; it may be consummated by mere words spoken or written.[69]

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[64] *U. S.* v. *Capo*, B. 37, p. 5.

[65] *U. S.* v. *Kirschner*, B. 69; *U. S.* v. *Hicks*, B. 160; *U. S.* v. *Herman*, B. 109.

[66] *U. S.* v. *Wallace*, B. 4, p. 5.

[67] *U. S.* v. *Wishek*, B. 153, p. 5. See also: *U. S.* v. *O'Hare*, B. 49; *U. S.* v. *Prieth*, B. 156; *U. S.* v. *Film Co.*, B. 33.

[68] *U. S.* v. *Waldron*, B. 79, p. 7.

[69] *U. S.* v. *Windmuller*, B. 112; *O'Hare* v. *U. S.*, B. 165; *U. S.* v. *Freiricks*, B. 85; *U. S.* v. *Stokes*, B 106.

As Justice Holmes, in *Debs* v. *U. S.*, says: "* * * If a part or the manifest inten-

What is the "recruiting and enlistment service"? In the first place it is composed of "all instrumentalities and officers in charge thereof."[70] But it extends, further, to voluntary enlistment. Thus, Judge Munger states, it may be an obstruction of the enlistment service if "statements are made to those who may enlist, the natural and reasonable effects of which would be, if believed, to discourage, delay, or hinder, even if it did not finally prevent those persons from enlisting in the Army or Navy."[71] And, of course, interference with the operation of the draft laws is obstruction of the recruiting service, wherefore the courts have generally held that to persuade young men not to answer draft notices is an obstruction of recruiting. This position has recently been sustained by the Supreme Court.[72]

We may sum up the third crime, then, by saying that the courts have held it illegal intentionally to check, retard or make slow, by word or deed, either the draft or voluntary enlistment,[73] or to interfere with the officers and agencies of either.

Section 3 of Title I of the original Espionage Act was greatly extended by an amendment which became law on May 16th, 1918. The amended section reads as follows, the newer portions of the section being included in brackets:

> "Whoever, when the United States is at war, shall willfully make or convey false reports or statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, [or shall willfully or convey false reports or false statements, or say or do anything, except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or

tion of the more general utterances was to encourage those present to obstruct the recruiting service, and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech." Quoted *U. S.* v. *Nearing*, B. 198, p. 7.

[70] *U. S.* v. *Stokes*, B. 106, p. 11.

[71] *U. S.* v. *Frerichs*, B. 85, p. 9. See also *U. S.* v. *Elmer*, B. 171. That one may be convicted of conspiracy to obstruct recruiting by words of persuasion is plainly stated in *Schenk* v. *U. S.*, B. 194, p. 4.

[72] *Schenk* v. *U. S.*, B. 194, p. 4. See also: *U. S.* v. *Capo*, B. 37; *U. S.* v. *Taubert*, B. 108; *U. S.* v. *Wolf*, B. 81; *U. S.* v. *Rhuberg*, B. 107; *U. S.* v. *Hitt*, B. 53. Also indicated in *U. S.* v. *Schenk*, B. 43; *U. S.* v. *Doe*, B. 55. It is argued that an interference with the draft is not punishable under this clause, because clause 2, section 2, deals with the same subject. This is not a valid argument because obstruction of the draft is not the only subject covered by this clause. *U. S.* v. *Prieth*, B. 130, p. 7.

[73] *U. S.* v. *Frerichs*, B. 85; *U. S.* v. *Henricksen*, B. 86; *U. S.* v. *Pierce*, 245 Fed. 878.

other securities of the United States or the making of loans by or to the United States], and whoever, when the United States is at war, shall willfully cause or attempt to cause (or incite) insubordination, disloyalty, mutiny or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct [or attempt to obstruct] the recruiting or enlistment service of the United States [and whoever, when the United States is at war, shall willfully utter, print, write or publish any disloyal, profane, scurrilous or abusive language about the form of government of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States or any language calculated to bring the form of government of the United States, the Constitution of the United States, or the military or naval forces of the United States, or the uniform of the army or navy of the United States, into contempt, scorn, contumely or disrepute, or shall willfully utter, print, write or publish any language intended to incite, provoke or encourage resistance to the United States or to promote the cause of its enemies or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, favor, teach, defend or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States therein; shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both: Provided that

"Any employee or official of the United States government who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and violent manner criticizes the Army or Navy or the flag of the United States, shall be dismissed from the service. Any such employee shall be dismissed by the head of the department in which the em-

> ployee may be engaged, and any such official shall be dismissed by the authority having power to appoint a successor to the dismissed official]."[74]

While the measure was pending in the Senate, Mr. France of Maryland sought to qualify its rigors with the following proviso:

> "Provided, however, that nothing in this act shall be construed as limiting the liberty or impairing the right of any individual to publish or speak what is true with good motives and for justifiable ends."[75]

The proviso passed the Senate, but at the request of the Attorney General was stricken out in conference.

> "Experience teaches," urged the Attorney General, "that such an amendment would to a great degree nullify the value of the law and turn every trial into an academic discussion on insoluble riddles as to what is true. Human motives are too complicated to be discussed,[76] and the word justifiable is too elastic for practical use."[77]

It will be noted that the first crime covered by the amendment of May, 1918, is "making false statements with the intent to obstruct the sale of United States bonds," etc. There is some reason for holding that the obstruction of the sale of bonds was covered by the

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[74] Public Document No. 150, 65th Congress (H. R. 8753).

The proviso amounts to a recommendation and need not be considered here. It was aimed especially at George Creel, Chairman of the Committee on Public Information.

[75] C. R., 65th Cong., 2nd Sess., p. 6517, April 25, 1918.

The introduction of new words into the law covers defects in the old law (*Louisville and Nashville R. R. Co.* v. *Motley*, 219 U. S.). Persons convicted under the law of 1917 for crimes enumerated in the amendment of May, 1918, may appeal their cases, on the ground that such crimes were not contemplated by the law of June 15, 1917. Whether the Supreme Court would grant new trials on this basis is doubtful in view of the utterance in *Schenk* v. *U. S.*, B. 194, p. 4.

[76] In showing that motive differed from intent, the words of Judge Howe, in *U. S.* v. *Waldron*, B. 79, p. 6, were given as a correct statement of law: "You should be careful not to mix motives with intent. Motive is that which leads to an act; intent gratifies it. A crime may be committed with both a good and an evil motive. To illustrate: The father of a large family steals bread for his starving children and also to deprive the owner of its value. He has two motives, one is good and one is evil, but he is guilty, notwithstanding he has a good motive as well as an evil motive, for he must not steal at all." See also: *Warner* v. *Tenth Nat. Bank*, 29 Fed. 387; *Johnson* v. *U. S.*, 157 U. S. 325; *Williamson* v. *U. S.*, 207 U. S. 425; *People* v. *Molineaux*, 61 E. E. 286.

[77] C. R., 65th Cong., 2nd Sess., p. 6518, May 4, 1918. The letters are well worth reading. They show (1) the necessity for such a law and (2) the influence of the Administration over Congress.

original act of June, 1917. For example, Judge Wooley thus charged a jury:

> "But if you find that the words constitute a false statement of fact, as distinguished from mere opinion, and that their natural and probable consequences, in being addressed to Mable P. Van Trump, were, if heeded, to prevent or deter her by persuasion or alarm from pursuing her activity in seeking subscriptions for liberty bonds, and thereby to obstruct their sale to that extent and thereby to interfere to that extent with the Government in getting money with which to operate the military forces, then I say to you, that you find the prisoner intended such consequence, and that, the words being false and willfully spoken with that intent, he has committed the offense forbidden by the statute and your verdict should be 'guilty'."[78]

However, a sufficient number of judges took the narrower view to cause the Department of Justice to wish the insertion of this clause in the latter act.

The words "or say or do *anything,* except by way of *bona fide* and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States, or the making of loans by or to the United States," give the substance of the crime. As always, intent is the material element of the offense, and must be determined from the circumstances in which something is said or done. The word "obstruct" has essentially the meaning given above—to impede, or hinder, or delay, or embarrass. "Obstruction," says Judge Munger, "would include mere delay as well as final refusal."[79]

The second new element introduced into the bill is making the attempt to obstruct the recruiting and enlistment service a crime. It had been widely held before the passage of the amendment that the obstruction must be actual,[80] however inconsiderable; that, in other words, some real obstruction must be shown to have followed the words or acts. It is true that some judges had taken a broader view, holding that words spoken or acts done with intent to obstruct

[78] *U. S.* v. *Frank Stevens,* B. 116, p. 6. See ante, discussion of "military forces."

[79] *U. S.* v *Brackett,* B. 170, p. 2. See also the discussion supra, of obstruction of recruiting and *Schenk* v. *U. S.,* B. 194, p. 4.

[80] *U. S.* v. *Zimmerman,* Nelles, *Espionage Cases,* p. 14; *U. S.* v. *Pundt,* B. 82; *U. S.* v. *Orlando Hitt,* B. 53; *U. S.* v. *Ves. Hall,* 248 Fed. 150.

Other references are given in connection with the third crime of the original Title I, Sec. 3, supra.

were punishable, but there were enough who took the narrower view to cause the Attorney General to recommend that the ambiguity be cleared up. As the law now stands, the degree of success of an attempt is not important.[81]

But some courts had held that the appeal to resist the law must be "direct." Thus, Judge Learned Hand, in *Masses Pub. Co.* v. *Patten,* says:

> "If one stops short of urging upon others that it is their duty or to their interest to resist the law, it seems to me that one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that, under this section, every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view."[82]

Judge Rogers, however, in the Circuit Court of Appeals, took the opposite view in the following unequivocal words:

> "If the natural and reasonable effect of what is said is to encourage resistance to the law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned or that it is to the interest of the person is not suggested. That one may will-

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[81] See: *U. S.* v. *Prieth,* B. 156; *U. S.* v. *Debs,* B. 155, p. 7.

In the former case, under the act of June 15, 1917, and in the latter, under the amendment of May 18, 1918, the *criminal intent is emphasized.* In these cases the jury would determine from circumstances whether the criminal intent was present.

[82] *Masses Pub. Co.* v. *Patten,* 244 Fed. 540.

Judge Hand had already spoken as follows: "One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of the law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state * * * To counsel or advise a man to an act is to urge upon him that it is his interest or his duty to do it. While of course, this may be accomplished as well by indirection as expressly, since words carry the meaning that they impart, the definition is exhaustive, I think, and I shall use it. Political agitation by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which, in normal times, is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. Ibid., p. 540. See also *U. S.* v. *Zimmerman,* Nelles, p. 14; *U. S.* v. *Hitt,* B. 53; *U. S.* v. *Pundt,* B. 82.

> fully obstruct the enlistment service, without advising in direct language against enlistments and without stating that to refrain from enlistment is a duty or is in one's interest, seems to us too plain for controversy."[83]

It would seem that the Supreme Court of the United States in the *Debs Case* endorsed the position taken by Judge Rogers. After reviewing the speech, Justice Holmes said:

> "If that [the obstruction of the recruiting service] was intended and if, in all the circumstances, that would have been the probable effect, it would not have been protected by reason of its being part of a general program and an expression of a general and conscientious belief."[83a]

It is the criminal intent, then, that is emphasized, and the intent is to be determined by the jury in every case.

The third offense covered by the amendment consists in willfully uttering "profane, scurrilous or abusive language about the form of government of the United States, the flag of the United States or the military or naval forces of the United States, or any language intended to bring them into contempt, scorn, contumely, or disrepute." Obviously, the intent qualifies the entire crime. Thus, Judge Sanford, in a charge to the jury, asks:

> "Now, if he used the language (admitted to be profane and abusive), did he use it intending thereby to bring the military forces . . . into contempt, disrepute or scorn?"[84]

It is interesting to note in connection with this clause that abuse of the President in his capacity as Commander-in-Chief of the Army and Navy, if profane, etc., and uttered with the intent forbidden by the statute, would probably be punishable under this statute.[85]

The fourth crime consists in "willfully uttering language intended to incite, provoke or encourage resistance to the United States or to promote the cause of its enemies."

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[83] *Masses Pub. Co.* v. *Patten*, 246 Fed. 38. See also: Wharton, Criminal Law, (11th ed.), Sec. 266; Bishop on Criminal Law, Sec. 641; *Regina* v. *Sharpe*, 3 Cox's C. C. 288.

[83a] *Debs* v. *U. S.*, B. 196, p. 3.

[84] *U. S.* v. *Martin*, B. 157, p. 6. See also *U. S.* v. *Vevig*, B. 162; *U. S.* v. *Equi*, B. 172.

[85] Judge Sanford, in *U. S.* v. *Martin*, B. 157, p. 6, said: "I charge you that a statement made concerning the President in his capacity as Commander-in-Chief of the Army and Navy would be a statement made concerning the military and naval forces within the meaning of the statute."

It was feared by many at the time of the adoption of this amendment that the law would prevent criticism of the President.

What is meant by "resistance"? Judge Bean, in defining the term, says:

> "The element of direct, active opposition by quasi-forcible means is required to constitute the offense of resisting the United States under this provision of the law."

He then defines "promote" thus:

> "To promote means to help, to give aid, assistance to the enemies of the United States in waging the war. The cause of the enemies of the United States means any and all of their military measures taken or carried on for the purpose of winning the war against the United States."[86]

The crime of displaying the flag of any foreign enemy is too clear to need discussion. It is taken to be an evidence of disloyalty and punished as such.

The willful advocacy of the curtailment of production in the country of products essential to the prosecution of the war is also made illegal by this amendment, if the intent is to hinder the United States in the prosecution of the war.[87] The clause is plainly adapted to punishing individuals who, under guise of advocating a better policy, advise the slackening up in the manufacture or production of war material. The next crime demands no discussion; it is evident that, where acts themselves are illegal, the willful advocacy of them may also be made so.

The last crime mentioned in this section is the supporting or favoring the cause of any country with which the United States

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[86] *U. S.* v. *Marie Equi*, B. 172, p. 14.

[87] The curtailment of production by violence is dealt with by the Sabotage Act, April 20, 1918 (Report of the Attorney General, 1918, p. 677) as follows:

Sec. 2. "That when the United States is at war, whoever with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on war, shall willfully injure or destroy or shall attempt to so injure or destroy, any war material, war premises, or war utilities. as herein defined, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than 30 years, or both."

Sec. 3. "That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully make or cause to be made in a defective manner, or attempt to make or cause to be made in a defective manner, any war material, as herein defined, or any tool, implement, machine, utensil or receptacle, used or employed in making, producing, manufacturing, or repairing any such war material, as herein defined, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than 30 years, or both."

is at war, or by word or act opposing the cause of the United States therein. Interpreting this clause, Judge Munger says:

> "To favor the cause of any enemy country under this statute means that what is said supports the object and purpose of the enemy in the war; that which the enemy seeks to attain. And to oppose the cause of the United States means that one by his words is opposing the object of the United States in this war."[88]

There has been much discussion whether this clause prohibits criticism of the conduct of the war. The language of one judge on this point is as follows:

> "The law does not forbid differences of opinion or reasonable discussion as to the causes which induced Congress to declare war, or as to the results to be attained by the war, or at the end of the war, nor the time and conditions under which the war should be brought to an end, nor any reasonable and tempered discussions and differences of opinion upon any or all of the measures or policies adopted in carrying on the war. The law is limited to making it a crime to oppose by word or act the military measures taken by the United States or under lawful authority by the officers of the United States for the purpose of prosecuting the war to a successful end."[89]

Such an interpretation cannot, I think, be considered other than moderate and necessary under the existing conditions.[90]

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[88] *U. S.* v. *Bunyard,* B. 168, p. 4.

[89] *U. S.* v. *Marie Equi,* B. 172, p. 15. See also *U. S.* v. *Brackett,* B. 170; *U. S,* v. *Bunyard,* B. 168.

[90] Perhaps this careful limitation of the terms of the amendment was due largely to the Attorney General, who required the submission of the facts to the department before a case was instituted. These instructions are contained in the report of the Attorney General (1918), p. 674.

Some criticism was directed at the Attorney General for urging the people to report violations of the Act, on the ground that such an invitation gave opportunity to cause trouble for personal reasons. The criticism was just (see Report of Attorney General, 1918, p. 673). Recently, however, the department has announced the policy of accepting reports of violations of the law only from its own investigators.

In 1918, 988 cases were commenced under the Act. 366 convictions followed, while 57 were acquitted, 51 discontinued, 21 dismissed or quashed. 197 pleas of guilty were entered, 222 trials by jury were held and 496 were pending at the close of the year. The fines of these amounted to $163,843.89. (Report of Attorney General, 1918, p. 156.)

That of the 363 convictions there were 197 pleas of guilty shows that there were comparatively few cases in which there could have been an error in judging the facts. The injustice which certain papers, such as the *Nation,* are charging against the department could scarcely be said to have been very great. Certainly the benefits in checking utter-

As was said above, it is an elementary rule of construction that a law must be construed so as to bring it within constitutional limitations.[91] We have just seen what scope the courts have been ready to accord the Espionage Act; but it will still be in place to consider some more direct expressions upon the constitutional question raised by the Act in relation to the First Amendment. Judge Neterer stated the general principle involved as follows:

> "All citizens are free to express their views on all public questions so long as they are actuated by honest purposes and not for the purpose of transgressing the rights of others, the laws of the states, or obstructing by force the execution of the laws of the United States; but no person has a right to convert the liberty of speech into a license or to carry it to a point where it interferes with the due execution of the law, where his opposition is not honest, and where he is not actuated by an intention of expressing his views, but is manifested by an intent to violate the rights of others or the laws of the United States."[92]

Somewhat more specifically, two general limitations upon freedom of speech are recognized as having been imposed by the Espionage Act to prevent liberty's becoming license.

In the first place, one is forbidden to advise another to resist a law of the United States; and one who abuses his right of free speech to this extent must, say the courts, take the consequences of his own temerity. In the words of Judge Wolverton:

> "Neither the right of the citizen to resort to the courts for redress of his grievances nor his right to free speech as guaranteed by the Constitution confers any right, in the exer-

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ances that might have obstructed our war efforts and in removing the dangers of mob violence (such as the Praeger case), which was apt to rise so long as the people felt that disloyalty was unchecked, have outweighed the evils of the law.

The Supreme Court on review has thrown some of these cases out for lack of evidence. No doubt the convictions had followed events that had inflamed the minds of the jury, or perhaps the charges to the jury were in too broad terms. See Emanuel Balzer et al., B. 3.

Clarence Waldron and others have had their sentences reduced by the executive (see trial, B. 79). Fred Krafft was pardoned by the President (case, B. 6 and 74). There are 150 other cases under review by the Department of Justice (see Phila. Ledger, March 5, 1919). Fifty-one have been recommended for executive clemency, and their cases are now before the President (April 12, 1919).

[91] *The Abby Dodge* (1912), 223 U. S. 166; *U. S.* v. *Del. & H. Co.* (1909), 213 U. S. 366; *Harriman* v. *Interstate Com. Comm.* (1908), 211 U. S. 407; *Knights T. I. Co.* v. *Jarman* (1902), 187 U. S. 197; *James* v. *Bowman* (1903), 190 U. S. 127.

[92] *U. S.* v. *Hulet M. Wells,* B. 70, p. 8. See also: *U. S.* v. *Benedict Prieth,* B. 156; *U. S.* v. *Olivereaux,* B. 40; *U. S.* v. *Frohwerk,* B. 128; *State* v. *Pape,* 90 Conn., 98.

> cise of these great privileges, to use them as a medium through which to wantonly resist or obstruct the execution of the laws."[93]

In the second place, the law forbids one to make false statements that tend to injure the United States. If we deny the government the power of suppressing the distribution of false statements made with intent to destroy the morale and efficiency of the armies when engaged in warfare and to prevent or interfere with their lawful organization and recruiting, we deny it the power of self-preservation.[94]

But the courts also justify the action of the Government in passing the Espionage Act on the ground that greater restrictions had already been placed upon the press without infringing upon its rights. Judge Ray's argument on this point is as follows:

> "In the *United States* v. *Toledo Newspaper Co.* [220 Fed. 458] it is held that the constitutional guarantee of the freedom of the press is not infringed by summary process and conviction for contempt for publications tending to obstruct the administration of justice. If this be correct, why may not Congress enact a law making it an offense to make and spread broadcast, when a state of war exists, pamphlets containing materially false statements which are intended to interfere with and obstruct the lawful raising and organization of armies and military operations of the Government, and which pamphlets are calculated to have that effect?"[95]

Looking at the question from a different angle, Judge Hough argues in *Friana* v. *U. S.*, that the Espionage Act does not restrict the freedom of speech and press at all as these are known to the Constitution. His language is as follows:

> "The free speech secured federally zy the First Amendment means complete immunity for the publication by speech or print of whatever is not harmful in character when tested by such standards as the law affords. For these standards we must look to the common law rules in force when the Constitutional guarantees were established and in reference to which they were adopted.

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[93] *U. S.* v. *Floyd Ramp*, B. 66, p. 4 (Quoted). See also: *U. S.* v. *Sugarman*, B. 12; *U. S.* v. *Baker*, 247 Fed. 124; *U. S.* v. *O'Hare*, B. 49.

[94] Paraphrased from *U. S.* v. *Clinton H. Pierce*, B. 15, p. 6. See also *Turner* v. *Williams*, 194 U. S. 279.

[95] *U. S.* v. *Clinton H. Pierce*, B. 15, p. 5.

> "By legislative action the boundaries of unpunishable speech have doubtless and often been enlarged, but the constitutional limits remain unchanged and what the legislature has done it can undo.
>
> "Legal talk-liberty never has meant, however, the unrestricted right to say what one pleases at all times and under all circumstances."[95a]

In short, freedom of speech and the press are not abridged unconstitutionally as long as they are not restricted by statute more severely than they were at the common law.

Finally, the doctrine of paramount necessity was invoked by Judge Lewis as follows:

> "You are instructed that this guarantee cannot be successfully invoked as a protection where the honor and safety of the nation is involved."[96]

More recently the Supreme Court itself has passed upon the question in the *Schenk* and *Debs Cases*. Sustaining the conviction of Schenk, Justice Holmes, speaking for the unanimous Bench, said:

> "We admit that in many places and in ordinary times the defendant in saying all that was said in the circular would have been within his constitutional rights. But the character of every act depends upon the circumstances in which it was done. The most stringent protection of free speech would not protect a man in falsely shouting 'Fire!' in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force. The question in each case is whether the words were used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."[97]

[95a] *U. S.* v. *Nearing*, B. 192, p. 4. See also Cooley Principles of Constitutional Law, 3rd ed., p. 299 ff.

[96] *U. S.* v. *Tanner*, B. 56, p. 3. See also *U. S.* v. *Capo*, B. 37 (The subserviency of Blackstone's definition of freedom of the press to the war powers is here laid down distinctly, p. 8). See further *U. S.* v. *Debs*, B. 155; *U. S.* v. *Doe*, B. 55.

V.

CONSPIRACY.

Complementary to Section 3 of the Espionage Act is Section 4, which penalizes *conspiracy* to do the acts forbidden by the earlier section. It reads as follows:

> "If two or more persons conspire to violate the provisions of Sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each party to the conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of the conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided for by Section 37 of the Act to codify, revise, and amend the penal laws of the United States, approved March 4th, 1909."[98]

A conspiracy is an agreement between two or more persons to do an unlawful act;[99] and when persons agree understandingly to accomplish an unlawful purpose there is a conspiracy though no word is spoken between them regarding it.[100]

But in addition to the agreement there must be an overt act, though it is not necessary that the purpose of the conspiracy should have been accomplished.[101]

The method of proof of a conspiracy is dealt with by Judge Youmans in the following passage:

> "The existence of a conspiracy may be shown either by direct or positive evidence, such as declarations or writings, or by circumstantial evidence showing that the parties charged acted in concert or in a manner or under circumstances warranting the inference that their acts were the result of previous understanding or agreement between them."

And once a conspiracy is formed, all the conspirators are recognized as principals, "although the part that some of them took therein is a minor or subordinate one, or is to be executed separately or at a distance from the other participants."[102]

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[97] *Schenk* v. *U. S.*, B. 194, p. 3.

[98] Stat. 65th Cong., 1st Sess., 219 (1917).

[99] *U. S.* v. *Balzer*, B. 3, p. 3. See also *U. S.* v. *Schenk*, B. 43.

[100] *U. S.* v. *Balzer*, B. 3, p. 4.

[101] *U. S.* v. *Schenk*, B. 43, p. 5.

[102] *U. S.* v. *Balzer*, B. 3, p. 5. The object of the conspiracy does not have to be carried out. Justice Holmes (*Schenk* v. *U. S.*, B. 194), says: "If the act * * * its ten-

It is evident, therefore, that any agreement of persons, in furtherance of which there has been any overt act, to do any of the things prohibited by Section 3 of the Espionage Act, would constitute a conspiracy and would be punishable under the law, provided the acts themselves were constitutionally prohibited; for if the acts themselves are constitutionally prohibited, there can be no reasonable doubt that a conspiracy to do them may be constitutionally prohibited.

VI.

TREASON.

If Congress had not enacted the Espionage Act or some equivalent measure, it is likely that the Government would have had frequent recourse, in endeavoring to repress disloyalty, to the statutes punishing treason, and that consequently the constitutional definition of treason would have received further elucidation from the Courts. This definition reads:

> "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."[103]

The terms here used need occupy us only briefly. Treason by "levying war against the United States" is treason by insurrection or rebellion; hence this part of the Constitutional definition does not concern us in this place.

The term "enemies" as used in the second clause applies, we are authoritatively informed, only to the citizens or subjects of a belligerent power in a state of hostilities with us; while "adhering" to such enemies is a state of mind to be inferred from the giving them aid and comfort.[104]

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dency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."

[103] Art. II, Sec. III, par. 1.

[104] *U. S.* v. *Greathouse*, 26 Fed. Cas. No. 15254. Giving aid and comfort is said to embrace "any act clearly indicating a lack of loyalty to the Government, and which, by fair construction, is directly in furtherance of hostile designs." 30 Fed. Cas. No. 18372.

An examination of previous cases will indicate what specific actions have been held to constitute treason within this clause:

(a) Trading with the enemy government, its agents or forces, whether for gain or for the purpose of aiding the enemy, if the natural consequence is that the enemy will receive benefit.

(b) Communication of military intelligence.

(c) Joining the enemy in time of war, or offering service by letter. *U. S.* v. *Greiner*, Fed. Cas. No. 15262.

The really interesting question from the point of view of our present inquiry is whether utterances, spoken or written, can ever constitute treason. Opinion on this point was in some confusion before the war began and it can hardly be said to have been cleared up by subsequent developments. Thus, in a charge to a jury, delivered in 1861, Justice Nelson of the United States Supreme Court said:

> "Words oral, written, or printed, however treasonable, do not constitute an overt act of treason within the definition of the crime. When spoken, written or printed in relation to an act or acts which, if committed with a treasonable design, might constitute such overt act, they are admissible as evidence tending to characterize it, and to show the intent with which the act was committed. They also furnish some evidence of the act itself against the accused. This is the extent to which such publications may be used—either in finding a bill of indictment or on the trial of it."[105]

Five years earlier, however, Justice Curtis had held that in the case of treason by levying war, inciting others to rebellion was treasonable even though the agitator was not present in person at the act of war.[106]

The one case which has arisen during the present war involving the question under discussion is that of the editors of the PHILADELPHIA TAGEBLATT, who were indicted for uttering publications favorable to Germany and inimical to the United States. The

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(d) Delivering up prisoners and deserters to the enemy. *U. S.* v. *Hodges,* 26 Fed. Cas. No. 15374.

(e) Acts directed against the government or government property with the intent to cause injury thereto and in aid of the enemy.

(f) Acts which tend and are designed to weaken our arms.

(g) Advising, inciting, and persuading others to give aid and comfort to the enemy.

The outlines here given are taken from Charles Warren, "What is Giving Aid and Comfort to the Enemy", Yale Law Journal, Jan., 1918, and L. C. Bradley, "Essay on Disloyalty", Princeton, 1918 (unpublished).

[105] 5 Blatchford 549, 550.

Senator Brandagee, however, in the debate on the Espionage Act, said:

"If a newspaper shall publish information, when the United States is at war, which gives aid and comfort to the enemy, it would be treason." C. R., 65th Cong., 1st Sess., p. 763.

Since the death penalty was provided by the Espionage Act for this crime we may say that such action is equivalent to treason in effect and in law (Title I, Sec. 2).

Mr. Davison of New York contends that the utterance of either written or spoken words is as much an overt act as is any deed, and that the doing or saying or writing anything which tends to hearten or encourage the enemy is as much within the constitutional provision as the rendering of material physical aid to the enemy would be. Pamphlet on "Treason", p. 5.

[106] *U. S.* v. *Greathouse,* Fed. Cas. No. 15254.

articles stigmatized as treasonable were classified by the Government's attorney under the following captions:

(1) Glorification of German strength and success
(2) Discouraging enlistments
(3) Attacking the sincerity of the United States
(4) Obstructing our war measures
(5) Commending German insurrections on this side
(6) Attacking the Government
(7) Falsifications [107]

A demurrer to this indictment declared that the only "overt act" charged therein was the publication of articles indicative of disloyal sentiments, wherefore, it was contended, the editors had committed no offense of a treasonable character. Judge Dickinson ruled, however, that the point was properly a trial question and that the Government should be allowed to prove that aid and comfort had been given to the enemy.

Referring to Judge Nelson's opinion, he said:

> "The opinion expressed by Judge Nelson will bear the construction that, although words, so long as they are words do not constitute an overt act of treason; yet when 'printed in relation to an act or acts which if committed with a treasonable design might constitute such overt act' they may be a part of the treasonable intent."[108]

Such an act, he intimates, would be the communication of intelligence of value to the enemy by printing it in the paper.

Later, too, in directing the jury to bring in a verdict of "not guilty," the same judge said:

> "You might have a situation in which it would be apparent to everyone that words of incitement, words of persuasion, words of appeal, words even that would arouse bad emotions, which would have an effect as a train of powder already laid, to which the minds would be likely to act as a a spark, if that condition of affairs existed; then mere words might constitute treason. But I call your attention to the fact that, so far as I recall, there is no evidence in this case of any such condition. There is nothing in this case beyond the fact of publication."[109]

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[107] Bulletin 42, p. 2.
[108] *U. S.* v. *Louis Wenner and Martin Darkow*, B. 42, p. 4.
[109] *Philadelphia Record*, March 27, 1918, p. 10, col. 2.

It would seem that the court implied that mere words might constitute treason only if it could be clearly proved that the circumstances under which the words were uttered were such that treasonable acts of violence would inevitably follow the utterance of the words. Such a ruling seems eminently conservative.[110]

CONSTITUTIONAL RESULTS.

The Espionage Act presents an old constitutional problem in a new light. Its principal results for Constitutional Law may be summarized thus:

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[110] It may be pertinent to mention here some more drastic proposals than the Espionage Act which failed of passage.

The most notable of these was a bill introduced by Senator Chamberlain of Oregon, which ran in part as follows:

"Be it enacted, etc. * * * that, owing to changes in the conditions of modern warfare, whereby the enemy now attempts to attack and injure the successful prosecution of the war by the United States by means of civilians and other agents and supporters behind the lines spreading false statements and propaganda, injuring and destroying the things and utilities prepared or adapted for the use of the land and naval forces of the United States, thus constituting the United States a part of the zone of operations conducted by the enemy, any person, whether a citizen or subject of the enemy country, or otherwise, who shall anywhere in the United States, in time of war, endanger or interfere with the successful operation of the land or naval forces of the United States * * *

"By printing or publishing any such printed matter, shall be deemed a spy and be subject to trial by a general court martial or by a military commission of the army or by a court martial of the navy, and on conviction thereof such shall suffer death or such other punishment as said general court martial or military commission or court martial shall direct."

The constitutionality of the bill is doubtful in view of the *Milligan case* (4 Wall), in which it was held that martial law cannot exist "when the courts are open and in the proper and unobstructed exercise of their function."

The fifth Amendment, however, admits trial by other means than by jury in cases "arising in the land or naval forces or in the militia, when in actual service in time of war or public danger."

Mr. Chamberlain attempted to extend this exception to propagandists whom he classed as spies. Is this extension of the term warranted?

The 82nd Article of War makes persons found spying about certain fortified places subject to court martial. In the Manual for Courts Martial, it is said that the words 'any person' mean all persons of whatever nationality or civil status.

These rulings do not cover the case in question. In order to justify the classification of propagandists as spies, it would be necessary, probably, to show that they were in direct communication with the enemy.

The bill was dropped, however, upon receipt of a letter from the President, in which he attacked the constitutionality and advisability of the law.

Another bill that failed of passage provided that (1) Any organization one of whose purposes is to effect an industrial, social, or economic change within the United States, without authority of law, by force is illegal.

(2) Any person in war time professing to be an officer of such an organization shall be fined $5,000 or imprisoned.

(3) Any owner, agent, etc., of any building, who during war allows an assemblage of such persons therein shall be fined $5,000 or imprisoned for not more than one year.

(4) Any publication advocating the principles of Sec. 1 shall be excluded from the mails.

(1) The freedom of the press is not unlimited, but is limited by the protective right of the community. As Chief Justice White says in *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 419-420:

> "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing."

Somewhat more specifically, Justice Holmes in *Schenck* v. *U. S.*, B. 194, p3, says:

> "The question in each case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

(2) The right of circulation is collateral with the right of publication. The famous dicta in the *Jackson* and *Rapier Cases*[111] must be so interpreted; or, if they are not, they are clearly erroneous. In any case, there is no right of circulation for matter whose utterance has been penalized constitutionally by Congress.[112]

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[111] *Ex Parte Jackson*, 96 U. S. 733 (1878). "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulation, the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."

In re Rapier, 143 U. S. 110 (1892): "The circulation of newspapers is not prohibited, but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people."

It may be reiterated that in *Champion* v. *Ames*, 188 U. S. 321, the Court carefully avoided the question whether papers containing advertisements of lotteries could be excluded from interstate commerce.

[112] See ante, discussion of the Trading-with-the-Enemy Act.

[113] "Burleson's Attitude," *New York Tribune*, Mar. 11, 1919; Senator Chamberlain on "the Effect of Army Courts on Bolshevism," *New York Times*, Mar. 11, 1919; Major Hume, on "Revolution," *New York Evening Post*, Mar. 11, 1919; Att'y General Palmer's attitude, *Evening Post*, April 4, 1919.

Senator New's bill embodying this sentiment would prohibit (1) The advocacy of, or distribution of matter tending to the "overthrow by force or violence, or by physical injury to person or property, or by the general cessation of industry, of the Government of the United States."

(2) Display of the flag symbolizing such a purpose.

(3) Mailing any matter urging such steps.

(4) Importation into the United States of such matter.

(3) The Censorship provision was rejected by Congress out of respect for the traditional opposition of press and people to any form of censorship. Undoubtedly, however, it was within the power of Congress to establish a voluntary censorship; that is, one recourse to which was purely optional on the part of publishers.

(4) Finally, the doctrine of administrative discretion has been strengthened.

The future of the Espionage Act is doubtful. On one hand there is a decided demand for some such law to suppress bolshevism and similar movements against the Government.[113] On the other hand there is an agitation for the removal of all restrictions upon speech and the press on the ground that such restrictions are no longer necessary.[114] The result remains to be seen.

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(5) This section penalizes the breach of the law by a fine of $5,000 or imprisonment for five years. The bill failed of passage.

A bill was drawn up by Major Hume, counsel for the Senate Investigating Committee, of the same import. Sections 1-4 cover almost exactly the ground covered by the amended section 3, Title I of the Espionage Act.

Section 5 repeals Section 4 of the Espionage Act.

Section 6 provides for the deportation of aliens violating the law.

Section 7 repeals all laws in conflict with the provisions of this bill. It is said that Major Hume will have this bill introduced as soon as Congress assembles.

[114] In the *New York Evening Post,* March 11, 1919, a statement by the Civil Liberties Bureau draws attention to the political effects of the Sedition Law of 1798, suggesting that the Espionage Act is similar to this law. It is obvious that the circumstances of the two cases are not parallel.

In the *Evening Post,* Mar. 11, 1919, a statement of the Civil Liberties Bureau charges that the Government is holding men convicted under the Espionage Act as political prisoners.

The *Nation* leads other periodicals in a publicity campaign for the repeal of the Espionage Act. These papers put the responsibility for the act entirely on the Democratic party and warn the Democrats that the effect is likely to be politically disastrous. But neither party can be given full credit for the passage of the act. The Republicans have the advantage in case the measure should be made a political issue only in the fact that they were opposed to conferring power on the Postmaster General.